No. 18709

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FORREST LAIDLEY and GEORGE P. VYE,

Appellants,

vs.

BARBARA BOGART HEIGHO, MAXWELL STEVENS HEIGHO and SECURITY-FIRST NATIONAL BANK,

Appellees.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

Statement of Facts.

February 5, 1957: Appellee, Barbara B. Heigho, was appointed executrix of the estate of her deceased husband, William Stevens Heigho, in Probate Proceedings in the Superior Court of California, for the County of Los Angeles.[1] [R. p. 33.] Outside the probate estate decedent had a revocable living trust. [R. p. 37.]

August 22, 1957: A claim was filed in the probate estate and approved therein, for legal services in the amount of $6,010, less $1,000 theretofore paid. The claim stated that the legal services were, ". . . *exclusive of the work done in connection with the stock of Calvert Lithographing Company which is an asset*

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[1]"R." refers to the Clerk's Transcript of Record. "Tr." refers to the Reporter's Transcript.

of the William S. Heigho Trust with the Farmers and Merchants Office of The Security First National Bank, Los Angeles, California". [R. p. 37.]

April 24, 1958: Appellants herein, filed their claim in said estate for an alleged debt which they claimed was due them from decedent, as of 1950, upon his alleged agreement to pay a brokerage fee commission in an amount of $117,992.50. [R. p. 33.]

May 5, 1958: The executrix duly rejected said claim and duly gave notice thereof. [R. p. 33.]

September 8, 1958: Report of California Inheritance Tax Appraiser was filed by him listing all probate estate assets and assets of the Trust at the Farmers & Merchants Office of the Security First National Bank, Los Angeles, of the value of $423,902.99, and setting forth the amount of inheritance and transfer taxes due. [R. pp. 33-34.]

September 9, 1958: First and Final Account and Petition for Distribution was filed and notice of hearing thereof was duly and regularly given. Among allegations in said Account and Petition was one concerning the filing and rejection of the Laidley-Vye (appellants) claim; and an allegation that no suit based thereon had been instituted against the executrix of the estate within the statutory period of three months. [R. p. 34.]

October 2, 1958: Decree approving final account and ordering distribution as prayed, including distribution of "all other property of said estate whether described herein or not." [R. p. 34.]

October 6, 1958: Final Decree was entered in judgment book. [R. p. 34.]

October 31, 1958: Executrix discharged, distribution having been fully made as provided by Final Decree. [R. p. 34.]

December 29, 1959: More than a year later, appellants here, Laidley and Vye, through their attorneys petitioned to re-open the estate, having previously failed to take any action on, or litigate their claim as required by law, and having failed to appeal from said Final Decree of Distribution. [R. pp. 34-35.]

March 11, 1960: The Superior Court entered an order denying said petition to re-open the estate. [R. p. 32.]

November 15, 1960: In an appeal taken by Appellants to the District Court of Appeal of the State of California from the Order denying said petition to re-open the estate the said order was affirmed. [R. pp. 30-42; *Estate of William Stevens Heigho, deceased,* 186 C. A. 2d 300; 9 Cal. Rptr. 196.]

July 5, 1961: Appellants filed their amended complaint in the action now on appeal herein. [R. pp. 2-11.]

October 24, 1961: Order granting motions of Appellees to be dismissed was entered herein. [R. pp. 47-48.]

October 4, 1962: Appellants filed Motion to Vacate the said Order Granting Appellees' Motions to dismiss. [R. pp. 49-50.]

December 10, 1962: Order entered denying Appellants' Motion to Vacate the Order of October 24, 1961, dismissing Appellees. [Tr., Dec. 10/62.]

February 11, 1963: Appellants filed Motion (a) for reconsideration of motion to vacate order of dismissal or (b) in the alternative for entry of judgment pursuant to Rule 54(b) F. R. C. P. [R. pp. 96-97.]

February 25, 1963: Appellants' Motion for reconsideration of their motion to vacate the Order dismissing Appellees was denied, and the motion for Entry of Judgment, pursuant to Rule 54(B) F. R. C. P. was granted. [Tr., February 25, 1963.]

March 18, 1963: Judgment of Dismissal of Appellees, pursuant to Rule 54(b) F. R. C. P., entered. [R. pp. 104-105.]

Statement Before Argument.

The record herein establishes a complete defense:

Appellants, by suit against Appellees, the distributees of the estate of William S. Heigho, Dec'd., are seeking to establish a claim that Heigho is indebted to them.

However, Appellants heretofore have been adjudicated to be barred from proceeding to establish said claim as a debt due them from Heigho; the Heigho probate estate has been closed and the California Courts have adjudicated that it may not be reopened. [R. p. 34.]

Therefore, without either Heigho, or his estate, Appellants lack the indispensable party defendant necessary ever to establish themselves as his creditors, and this appeal must be dismissed.

Appellees have further answered Appellants' Brief, in argument following.

Statement of Points of Appellees' Argument.

I.

The issues between Appellants and Appellees are *res judicata.*

II.

Appellants' claim against the deceased Heigho and Appellees has heretofore been litigated in California Probate Court proceedings, and adjudicated "forever barred."

III.

Heigho is deceased. His estate is closed. Without either (indispensable parties) Appellants' claim cannot again be litigated.

IV.

Decedent's alleged creditors can proceed only through the estate.

V.

Comment on Appellants' Brief.

I.

The Issues Between Appellants and Appellees Are Res Judicata.

Appellants sue herein to establish (as against Appellees, who are a probate estate distributee, and a trustee and beneficiaries of an *inter vivos* revocable trust of William S. Heigho, deceased) a claim of an indebtedness allegedly due from said deceased, "for brokers' commissions", they assert were earned in 1950.

Appellants do this in spite of the fact that they heretofore appeared as parties in Probate Court proceedings, in California, in the Estate of Heigho, as

claimants, and filed therein, on April 24, 1958, a regular estate claim for this same alleged indebtedness, which was adjudicated against them.

Said claim was rejected May 5, 1958, and due notice thereof given Appellants. Appellants took no further action whatsoever on said claim.

On October 6, 1958, a final decree was entered in said probate proceedings, the court approved and ratified the rejection of the Appellants' claim and found and ordered that said claim was "forever barred", as a debt due Appellants.

Said Probate Court decree has never been challenged.

Therefore, the claim of the Appellants here, as stated in *Estate of Heigho* (1960), 186 Cal. App. 2d 360-370 [9 Cal. Rptr. 196], has been fully "adjudicated by the decree of final distribution, . . ."

These same claimants are now before this Court, as Appellants, on the same claim so adjudicated by the California Court. The California Code of Civil Procedure, section 1911, provides that what is deemed adjudicated in a former judgment, is that which appears upon its face or which was actually and necessarily included therein or necessary thereto.

Because of said prior adjudication the Appellees here, who are the distributees of Heigho's estate, are entitled to an affirmance of the judgment and order of the United States District Court, dismissing them from this case.

The established doctrine of *res judicata,* is a complete bar to the present action against Appellees, who are the same parties and privies thereto (taking through

William S. Heigho, dec'd.) as were the parties in the California State Court proceedings.

When issues pleaded in a complaint have been fully adjudicated by a court of competent jurisdiction another trial on the same issues is barred by such prior decision and the defense of *res judicata* may be raised by motion to dismiss. *Curtis v. Utah Fuel Co.* (D.C. N. J. 1941), 2 F. R. D. 570, affirmed 132 F. 2d 321; Cert. Denied 63 S. Ct. 933, 318 U. S. 789, 87 L. ed. 1156 (wherein plaintiff attempted to try in a federal court a matter already adjudicated by State Court as to certain defendants; said defendant's motion to strike the complaint and to quash the summons was granted).

In *Ballard v. First National Bank of Birmingham* (U. S. 5th Cir. 1958), 259 F. 2d 681, at page 683, the Court said as to the rule of *res judicata:*

> "It rests on the finality of judgments in the interest of the end of litigation and it requires that the fact or issue adjudicated remain adjudicated. It, in short, is that one, who has permitted a final judgment to go against him, is estopped, by that judgment from contending elsewhere against the parties to it and their privies that the fact or issue is otherwise than as there adjudged."
>
> *Bennett v. Commissioner of Internal Revenue* (U. S. 5th Cir. 1940), 113 F. 2d 837, 839.
>
> "Parties and their privies are made to abide definitive and final judgments and litigations are concluded."

As said in *Monagas v. Vidal* (U. S. Cir. 1st, 1948) 170 F. 2d 99 (Cert. denied, Jan. 17, 1949) on page 106, concerning *res judicata:*

> "It is a rule of judicial administration grounded upon the need for putting a period to litigation, for it is to the interest of the public in general and of particular litigants alike that there be an end to litigation which without the doctrine would be endless."

The law of California, directly relating to this case, is set forth in the California Code of Civil Procedure, Section 1908. It provides that the said final order of distribution of the California Superior Court is a conclusive determination of each and every one of the rights asserted herein by the Appellants:

> "The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:
>
> 1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, . . . the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person.
>
> 2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same

> capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding."

It is the right or obligation to be enforced, not the remedy or relief, which determines the sameness of the causes of action. The Courts have established a test of the applicability of the doctrine of *res judicata.*

As said in *Morrison v. Willhoit* (1944), 62 Cal. App. 2d 830, 839; 145 P. 2d 707:

> "Where evidence used to establish a demand or a defense is identical with that used in a former action between the same parties, the doctrine of res judicata is clearly applicable."

Taylor v. Castle (1871), 42 Cal. 367, 372, states:

> "The cause of action is said to be the same where the same evidence will support both actions; or, rather, the judgment in the former action will be a bar, provided the evidence necessary to sustain a judgment for the plaintiff in the present action would have authorized a judgment for the plaintiff in the former."

This test when applied to the case at bar and to the Appellants' case in the California Superior Court, shows that the evidence in each of the cases necessarily is the same. The claim in the California Court and the claim here both arise out of the same alleged contract, for the same alleged brokerage services, which Appellants assert they rendered for the deceased William S. Heigho.

It is obvious from the record, that in any action, in any court, to establish their claim, Appellants must prove the same chain of events, to wit:

(1) A legal contract for services to William S. Heigho, deceased.

(2) That they became entitled to payment thereunder.

(3) That they have not been paid.

This same chain of proof necessarily exists in both cases. Therefore, the bar of *res judicata* applies, in that in each case, Appellants necessarily must proceed against the deceased Heigho, or his estate (which they cannot do) before reaching Appellees.

II.

Appellants' Claim Against the Deceased Heigho and Appellees Has Heretofore Been Litigated in California Probate Court Proceedings, and Adjudicated "Forever Barred."

Appellants claim here to establish a debt due them from Heigho, was heretofore filed and litigated by them, in the California Probate Court proceedings in the estate of Heigho.

In said proceedings, by Final Decree of Distribution, Appellants' claim was adjudicated "forever barred", and the Heigho estate, including "all other property of said estate whether described herein or not" was distributed. [R. p. 34.]

In litigation instituted over a year later by Appellants to re-open the Heigho estate and appoint an administrator, so that Appellants might sue in an effort to establish said claim, the California courts, on November 15, 1960, adjudicated that the Heigho estate could not be re-opened. [R. pp. 30-42.]

On July 5, 1961, Appellants impleaded, as alternate defendants, the said Heigho distributees, in this action

in the United States District Court; on the same claim already adjudicated in the California courts. [R. pp. 2-10.]

Upon Appellees' motions, the United States District Court gave full faith and credit to the prior judgments and orders of the California court, and dismissed said Appellees from the action.

Said Order of Dismissal is based on the established record that Appellants' claim has not been—and is incapable of being—reduced to judgment; that the claim is forever barred by the provisions of Section 714 of the California Probate Code, for having failed to bring suit thereon within the time provided, and the California Courts' adjudication that the Heigho estate may not be re-opened for the purpose of bringing an action on the claim. *Estate of Heigho* (1960), 186 Cal. App. 2d 360, 9 Cal. Rptr. 196. [R. pp. 30-42.]

Section 714, California Probate Code provides:

> "When a claim is rejected * * * written notice of such rejection shall be given by the executor or administrator to the holder of the claim * * * and the holder must bring suit in the proper court against the executor or administrator, within three months after the date of service of such notice if the claim is then due * * * otherwise the claim shall be forever barred."

As admitted by Appellants and established by the record, the said Appellants failed to bring suit against the executrix within the statutory period, or at all, and under and pursuant to said statute, their claim became "forever barred".

Subsequently the fact that Appellants' claim was forever barred was affirmed by the California District Court of Appeal. In said Court's decision, the reason and the necessity for said rule of statutory limitation are set forth in detail, and include the public policy of prompt settlement of estates not only for the sake of creditors but also for the benefit of heirs and beneficiaries, the rendering of final accounts and distribution, as well as the payment of inheritance and federal estate taxes. [R. pp. 37-38, 40.]

The limitation of Section 714, California Probate Code, like all statutes of limitation, has been enacted to "promote justice by preventing the assertion of stale claims". *Day v. Green* (1962), 207 A. C. A. 320 at p. 336.

Because of this, as said in *Beard v. Herbert C. Melvin, as executor* (1943), 60 Cal. App. 2d 421, 431; 14 P. 2d 720:

> "* * * the consequences of the failure to comply with the statute must be borne by the party who seeks to enforce the agreement, and it follows that plaintiff has no cause of action on the contract."

The United States Courts have never hesitated to give full faith and credit to the Court's decisions and the laws, of the several states. [*Erie v. Tompkins* (1938), 304 U. S. Supreme Court 64; 82 L. Ed. 1188.]

III.

Heigho Is Deceased. His Estate Is Closed. Without Either (Indispensable Parties) Appellants' Claim Cannot Again Be Litigated.

It is fundamental that a court is without jurisdiction to proceed to the trial of an action, when an indispensable party is missing.

The indispensable party, Heigho (or, being deceased, the Executor or Administrator of his estate) is missing here.

The Appellants' complaint herein alleges that Heigho became indebted to them under a contract of employment, for a brokers' commission for services rendered. [R. p. 4.]

It is obvious that in any action to establish a debt due, under such a contract, the indispensable party defendant is the person who allegedly entered into the contract.

In this action Heigho is the sole and only person alleged to have been a party to said alleged contract and to have become liable to Appellants under its terms.

Thus it follows that the indispensable party to this action is Heigho (or his estate). Without him (or his estate representative) there is no way that any such contractual obligation as claimed, can be established. Both are missing. [California Civil Code 1550.]

That Heigho is an indispensable party seems even beyond question. Indispensable parties are "* * *

those who have an interest in the controversy of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience. Unless these are made parties, the court will not entertain the suit."

Halpin v. Savannah River Electric Co. (1930), (4th Cir.) 41 F. 2d 329, 330.

Also:

Shell Development Co. v. Universal Oil Products Co. (C.C.A. Del.) 157 F. 2d 421;

Baird v. Peoples Bank & Trust Co. of Westfield (C.C.A. N. J.), 120 F. 2d 1001.

By reason of the Appellants' claim being forever barred [Cal. Prob. Code 714, *supra*] and the refusal of the California Courts to re-open the Heigho estate and appoint an administrator, Appellants are left bereft of the indispensable party defendant, in any court proceeding.

As these matters stand clearly established, the United States District Court could not do otherwise than dismiss the Heigho defendants.

In the case of *McShan v. Sherill* (1960), 283 F. 2d 462 [Ninth Circuit], this Court stated that a decree, affecting title in property of persons not joined as parties, is improper; and further (page 464):

"The absence of indispensable parties can be raised at any time . . . Rule 12 (h) F.R.Civ.P. provides that the defense of failure to join an

indispensable party is never waived . . . *no Court can adjudicate directly upon a person's right, without the party being either actually or constructively before the Court.*" (Italics ours.)

Further:

"If such persons [indispensable parties] exist and are not accessible to service, or if their joinder would oust the district court of jurisdiction, the case must of course be dismissed."

Also:

Brodsky v. Perth (1958-Third Circuit), 259 F. 2d 705. Failure to join indispensable party is fatal to a complaint and it must be dismissed;

Martucci v. Mayer (1954-Third Circuit), 210 F. 2d 259. Action dismissed for want of jurisdiction because indispensable party missing;

Rule 19(a)(b), F. R. C. P. provide that indispensable parties must be joined in an action. 3 *Moore Federal Practice,* 2152-53.

Appellants reference to section 3439.09, of the California Civil Code, relating to "Remedies of Creditors: On maturity of Claim.", has no application here. Appellants are not creditors, and they cannot become creditors because they have been "forever barred" from establishing the claim alleged in their amended complaint. [*Supra,* II and III.]

IV.

A Decedent's Alleged Creditor Can Proceed Only Through Estate.

The following comments are necessary because Appellants, in their opening brief, designate themselves as "creditors" of Heigho—although they are only claimants—and by asserting that in 1951, Heigho transferred property (to his revocable *inter vivos* trust) "for the purpose of defrauding Appellants' assignors", which left "Heigho insolvent". They admit however that "he retained the power of revocation". (Appellants Brief, pp. 2-3.)

The record clearly establishes that Appellants are claimants here on a claim which heretofore has been adjudicated "forever barred". [R. p. 33 and p. 38.]

In the California courts, Appellants sued to reopen the Heigho estate, on charges that the trust was "in fraud of creditors". The courts adjudicated there was no fraud. [R. pp. 36-37.]

The courts found that the inheritance tax appraiser's report contained, and described, the trust assets; and that the inheritance and transfer taxes due thereon were set forth and paid. [R. pp. 33-34.]

That the assets of the trust were available, if needed to pay decedent's creditors, was never questioned.

Appellants made no objection to the estate being closed, and their claim became barred by the decree of final distribution. [R. p. 38.]

The California Probate Code, Sections 579-580, provides for bringing into the probate estate any assets of decedent outside the probate inventory, when required to pay decedent's creditors.

The said Code Sections 579-580 extend to all properties of decedent including any assets he may have conveyed with intent to defraud creditors.

The code further provides that the executor or administrator must bring the action to recover the assets and, therefore, are indispensable parties.

Beswick v. Churchill (1913), 22 Cal. App. 404; 134 Pac. 722;

Beswick v. Dorris, et al. (1909), 174 Fed. 502;
Staniels v. Copeland (1941), 48 Cal. App. 2d 124; 119 P. 2d 396.

V.

Comment on Appellants' Brief.

In Appellants' "Questions Presented" [Appellants' Brief, pp. 5-6] they ask if Appellees' affirmative defense of *res judicata* was established by the showing made, which did not include an authenticated copy of any judgment on which Appellees relied.

This suggestion of lack of adequate evidence and proof of Appellees' position is raised herein by Appellants, for the first time. It was not raised in the United States District Court. Such a suggestion is completely without merit for the following reasons:

(a) On Appellees' motions to be dismissed, Appellants consented thereto. Appellants' counsel told the court that in his opinion the Appellees' defense of *res judicata* was good. He said: ". . . Plaintiffs' counsel is unable to state to the court any reason why the defense is not good." [R. p. 45, lines 6-9.] So far as Appellants are concerned the U. S. District Court's Order was in effect a consent order.

(b) About a year subsequent to the Order, Appellants moved to Vacate the Order. The motion was denied. Later Appellants moved again to vacate the Order or, in the alternative, to enter judgment thereon. The request to enter judgment was granted. [R. pp. 96-97; 104-105.]

(c) Prior to Appellants' brief herein, the question of an authenticated copy of the California court judgment was never raised. Appellants were parties in the State court proceedings. An affidavit of George R. Larwill, one of counsel for Appellees, filed in support of Appellees' motions to be dismissed, contained statements of evidence [R. pp. 26-42] acknowledged and accepted by Appellants. [R. p. 45, lines 5-24.] A certified copy of the decision in the case of *Estate of Heigho,* 186 Cal. App. 2d 360 was a part of the affidavit. [R. pp. 30-42.]

On the foregoing record of Appellants' acceptance and consent to the order of dismissal, they cannot now be heard to complain.

Moreover it is a well settled rule of law that the theory upon which a case was tried in the court below must be strictly adhered to on appeal or review. A party will not be permitted by an Appellate Court to assume a position inconsistent with that taken by him in the trial court. [*Lynch v. United States,* 292 U. S. 571, 78 L. Ed. 1434, 54 S. Ct. 840.]

Conclusion.

The Judgment and Order of the United States District Court, dismissing the three Heigho defendants, the Appellees here, should be affirmed.

Respectfully submitted,

LARWILL & WOLFE,
By GEORGE R. LARWILL, and
CHARLES W. WOLFE,
Attorneys for Appellees.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GEORGE R. LARWILL.